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# Constitutional Branding

Michael J. Gerhardt

*University of North Carolina School of Law*, [gerhardt@email.unc.edu](mailto:gerhardt@email.unc.edu)

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# CONSTITUTIONAL BRANDING

*Michael J. Gerhardt\**

## I. INTRODUCTION

When the *Hofstra Law Review* began over forty years ago, the Senate had just rejected President Richard Nixon's nominations of Clement Haynsworth and Harold Carswell to the U.S. Supreme Court.<sup>1</sup> In the ensuing years, Supreme Court selection does not appear to have gotten easier. Three other Supreme Court nominations have failed;<sup>2</sup> and close votes in several other proceedings,<sup>3</sup> along with the blockage of dozens of lower court judicial nominations made by Presidents George H. W. Bush, Bill Clinton, George W. Bush, and Barack Obama,<sup>4</sup> have led most commentators to conclude that the federal judicial selection has broken down.<sup>5</sup>

This Article examines an under-appreciated but significant dynamic that both reflects and helps to explain the persistent contentiousness over judicial nominations—the constitutional branding of judging in the federal judicial selection process. The concept of “branding” is central to the field of trademark law,<sup>6</sup> in which it generally refers to coordinated

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\* Samuel Ashe Distinguished Professor of Constitutional Law and Director of the UNC Center on Law and Government, University of North Carolina at Chapel Hill. B.A., Yale University; M.Sc., London School of Economics; J.D., University of Chicago. I am very grateful to both Cara Richards and Edward Roche, UNC Law School Class of 2014, for their excellent research assistance.

1. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 15, 17 (3d ed. 1992).

2. *Supreme Court Nominations, Present–1789*, U.S. SENATE, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited July 27, 2012).

3. *Id.*

4. DENIS STEVEN RUTKUS ET AL., CONG. RESEARCH SERV., RL 31868, U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS BY PRESIDENT GEORGE W. BUSH DURING THE 107TH-109TH CONGRESSES 30 (2007), available at <http://www.fas.org/sgp/crs/misc/RL31868.pdf>; Mary Bruce, *White House Urges Senate GOP to Stop Blocking Judicial Nominees*, ABC NEWS (Mar. 14, 2012, 12:01 AM), <http://abcnews.go.com/blogs/politics/2012/03/white-house-urges-senate-gop-to-stop-blocking-judicial-nominees/>.

5. See, e.g., John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 191 (2003).

6. See *infra* notes 45-46 and accompanying text.

efforts to package, describe, and characterize commercial products or services in ways that will appeal to consumers.<sup>7</sup> “Constitutional branding” refers to a similar form of collective action with respect to judicial selection—namely, the organized or coordinated efforts to characterize, package, categorize, stigmatize, describe, promote, and demean particular nominees to the Supreme Court or their interpretive approaches for various purposes, including mobilizing public support for, or opposition to, particular Supreme Court nominations.<sup>8</sup>

Applying what we know about the branding of trademarks to the Supreme Court confirmation process will greatly enrich our understanding of how law and politics interact in the appointments of Supreme Court justices. By vesting the authority over Supreme Court appointments to presidents and senators, the Appointments Clause of the U.S. Constitution both licenses and is premised on the expectation that politics, in one form or another, will shape the nomination and confirmation of Supreme Court Justices.<sup>9</sup> The dominant narratives of the Supreme Court appointments process emphasize the political factors that influence senatorial decision-making on such nominations. At their best, these narratives provide rich, detailed discussions and empirical analyses of the different factors influencing presidential or senatorial actions pertaining to Supreme Court nominations. Yet, these narratives are incomplete because they largely overlook the mechanisms or means by which national political leaders channel these factors, or take them into account in Supreme Court selection. Branding is one such means.

In fact, brands perform many of the same functions in the Supreme Court appointments process as they do in the commercial context. To begin with, they serve as heuristics or the means by which key decision-makers and opinion leaders signal to interested consumers important information about the product: Supreme Court nominations. Just as commercial branding mobilizes consumers to do certain things such as investing in or purchasing certain products,<sup>10</sup> constitutional branding mobilizes or secures support or opposition within the Senate (if not also within the electorate) to certain nominations. Just like commercial brands, constitutional branding concerns more than selling a particular commodity to interested consumers.<sup>11</sup> It can signify a source or tell a

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7. See DOUGLAS B. HOLT, *HOW BRANDS BECOME ICONS: THE PRINCIPLES OF CULTURAL BRANDING* 2-3 (2004).

8. See *infra* Part III.

9. U.S. CONST. art. II, § 2, cl. 2; see also DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 34 (8th ed. 2008).

10. Julie Manning Magid et al., *Quantifying Brand Image: Empirical Evidence of Trademark Dilution*, 43 AM. BUS. L.J. 1, 9, 20-21 (2006).

11. Skeptics might raise two concerns about the utility of importing the concept of branding

story; it can identify things and distinguish some things from other things. Brands also change over time. Apple, for instance, used to be well-known as the trademark for The Beatles' record label;<sup>12</sup> later it was solely about a more hip kind of computer, and today it is about much more. In fact, Apple is, *inter alia*, the largest distributor of music.<sup>13</sup> Similarly, prior to the Civil War, the Democratic Party stood for the principle of state sovereignty, but by the middle of the twentieth century became known for both supporting significant expansions of national authority and championing civil rights—positions that had been associated with the Republican Party from the early days of its founding until the 1920s.<sup>14</sup> Constitutional brands are not any more stable or fixed in what they convey than commercial ones; they are subject to similar social, political, economic, and other developments that can change their meaning or narratives. Last but not least, brands facilitate political objectives. Branding can serve the political objectives of making particular judicial nominations appealing, or unappealing, to a particular set of consumers, including senators. From trademark law, we know that brands are repositories of good will; they can symbolize quality or reputation.<sup>15</sup> Consequently, a study of constitutional branding

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into the judicial selection process, though each turns on a misunderstanding of trademark law. First, some people might be concerned that choosing Supreme Court nominees differs from choosing products because doing the latter rarely involves making permanent choices or decisions for life. In fact, people do purchase some brands for life, or with life-long ramifications, such as the colleges they choose to attend or the religious faiths they choose to follow. Second, some people might be concerned that the choices facing senators in confirmation proceedings are not similar to those confronting consumers. The concern is that consumers usually make choices from two or more alternatives, whereas senators do not. In fact, senators have several choices in every Supreme Court confirmation proceeding: "buying" or approving the nominations pending before the Senate; rejecting or delaying nominations in the hopes of preserving vacancies for presidents from their parties to fill; endorsing particular judicial philosophies (or not) in the course of voting on particular nominations; rejecting a series of nominees because senators prefer different nominees or want to express disapproval of a particular brand, product, or president; or abstaining from, or avoiding, making a choice about particular nominees. See generally DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL 31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE (2005), available at <http://fpc.state.gov/documents/organization/50146.pdf> (discussing the role of the Senate in the Supreme Court nomination process).

12. Joel Rose, *The Beatles' Apple Records: 40 Years Later*, NPR (May 14, 2008), <http://www.npr.org/templates/story/story.php?storyId=90437894>.

13. Press Release, Apple, iTunes Store Top Music Retailer in the US (Apr. 3, 2008), <http://www.apple.com/pr/library/2008/04/03iTunes-Store-Top-Music-Retailer-in-the-US.html>.

14. See Judith A. Hagley, *Massive Resistance—The Rhetoric and the Reality*, 27 N.M. L. REV. 167, 196-97 (1997); Marianne L. Engelman Lado, *A Question of Justice: African-American Legal Perspectives on the 1883 Civil Rights Cases*, 70 CHI.-KENT L. REV. 1123, 1124, 1151-52 (1995).

15. Edward S. Rogers, *The Lanham Act and the Social Function of Trade-Marks*, 14 LAW & CONTEMP. PROBS. 173, 176 (1949).

illuminates the important connection otherwise missing in the literature between the debates and posturing in the confirmation process and the shaping or formation of public opinions about the Court, its decisions, the judiciary, and the rule of law. Notably, focusing on branding further illuminates how the Supreme Court confirmation process is designed to filter out bad nominations rather than to ensure or mandate the confirmation of a single brand of judging. Thus, branding is a principal means by which political authorities, media elites, and others seek to influence the choice or fate of Supreme Court nominations and the terms of debate and outcomes of their confirmation proceedings.

This Article proceeds in three parts. In Part II, I compare and contrast branding to two of the most popular, widely used methodologies in social science to measure the efforts of public leaders to shape public discourse about Supreme Court appointments. I identify what these modes have in common, how they differ from each other, and their respective strengths and weaknesses in illuminating the relationship between how public leaders talk about or characterize justices, their decisions, or their styles of judging. I also look at the public's attitudes about these things and the outcomes of Supreme Court confirmation proceedings.

In Part III, I examine the relative merits of the three popular ways of demonstrating the impact or role of constitutional branding in the Supreme Court confirmation process. The first is quantitative. There are several excellent social science studies of the impact or relevance of different factors on public opinion and senators' votes regarding Supreme Court nominations. However, these studies fail to illuminate many significant aspects of the confirmation process. Perhaps most importantly, we lack empirical analysis of the relationship between branding and the framing employed, public opinion, or how senators perform in Supreme Court confirmation proceedings. The second candidate for measuring constitutional branding is purely qualitative, by which I mean describing or critically analyzing particular events or patterns in the confirmation process. Qualitative accounts of branding are the least satisfying because, to the extent they exist, they are usually partisan-driven accounts of the process and otherwise fail to provide any comparative analysis of competing brands. Comparative analysis is important because it would show how the competition among brands shapes their meanings and narratives. The third and perhaps best candidate for explicating constitutional branding is the field of historical institutionalism in the social sciences, which focuses on the patterns of different institutions' decision-making on Supreme Court nominations over time. These patterns illuminate how these institutions both shape

and are shaped by various political and social forces or concerns, including branding. To date, legal scholars have rarely applied historical institutionalism to the Supreme Court confirmation process. Social scientists generally and historical institutionalists in particular have yet to provide extensive, detailed analysis of the phenomenon of branding. Institutions are particularly well designed to promote, or counteract, the effects of different brands. Hence, historical institutionalism could enrich our understanding of the Supreme Court confirmation process by providing a series of case studies on how branding has been systematically employed by presidents, senators, interest groups, and media elites in particular proceedings, why, and to what effect.

The fourth and final Part consists of three case studies melding historical institutionalism and empirical analysis to measure the use, development, and impact of three brands on Supreme Court confirmation proceedings. The brands are “strict construction,” “umpiring,” and “real-world judging.” These brands provide useful case studies, because they each exemplify different stages of branding: The first, “strict construction,” is a good example of a timeless brand, much like Harvard in the field of higher education or Coca-Cola in the market of soft drinks. The second, “umpiring,” is an emerging brand that has recently had some appeal and thus gained some favor and traction in the relevant marketplace. The third brand, “real-world judging,” is brand-new, or a heuristic brand aspiring to become an appealing alternative to the brands of “strict construction” and “umpiring.” These case studies illustrate several aspects of constitutional branding. First, each has much in common with commercial branding, including but not limited to its appeal to certain constituencies, its provocation of rival or competing brands, and its being subject to challenge as deceptive or misleading. Second, each of these brands performs multiple functions. Among the functions are signaling to various constituencies whether they should support or oppose particular nominations, mobilizing the actual support for or opposition to particular nominations, ruling out particular nominations or styles of judging as unacceptable, and providing a basis (or cover) for voting for or against a particular nomination. Third, there is empirical data suggesting at the very least that branding was a common factor in Senate voting in each of the four most recent Supreme Court confirmation proceedings. Indeed, there appears to be nearly a one hundred percent correlation between branding and the nominations of Chief Justice John Roberts and Justices Samuel Alito, Sonia Sotomayor, and Elena Kagan. For example, senators who praised the brand of “umpiring” voted in favor of Supreme Court nominees Roberts and Alito, who purportedly embodied this brand, while senators who

criticized this brand voted against Roberts and Alito. The records of senators' voting in each of the last four Supreme Court confirmation proceedings indicate further that, in the rare circumstances in which senators crossed party lines to vote for Supreme Court nominations made by presidents from the opposition party, they largely avoided negative branding. Instead, the senators tended to justify their votes on a non-ideological basis, particularly their recognition of a president's entitlement to Senate deference to a nominee who had the requisite qualifications for appointment to the Court.

The Article concludes that the persistence of branding suggests that senators must think that it works. They think that it works because they know that it has worked in other contexts. They think it has worked on prior occasions in the confirmation process and that it produces the effects that they want, including the signaling of a senator's likely position on a given nominee and the corresponding mobilization or maintenance of support within key constituencies.

## II. BRANDING AND ITS ALTERNATIVES

Though the politicization of Supreme Court appointments is widely lamented, surprisingly little attention has been given to the means by which national political leaders seek to coordinate public or other support to influence outcomes in the confirmation process. In fact, the Constitution clearly licenses the politicization of Supreme Court and other judicial appointments.<sup>16</sup> The Constitution expressly places formal authority over Supreme Court appointments in national political leaders,<sup>17</sup> who will naturally take political considerations into account and use all the political warrants at their disposal, including public support, to influence the outcomes of Supreme Court confirmation proceedings. Yet, scholars have rarely systematically examined the connection between coordinated efforts to shape public attitudes or leaders' opinions about particular Supreme Court nominations and the confirmation proceedings for those nominations.

In this Part, I define, compare, and contrast three possible ways to measure this connection—labeling, framing, and branding. Each of these methods is popular in different academic disciplines, and each seeks to describe collective, concerted efforts to impress meanings on particular

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16. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .”).

17. *Id.*

persons, events, or things. The comparative analysis of these methods illuminates their relative strengths and weaknesses in measuring the impact of coordinated efforts to shape public perceptions, discourse, rhetoric, or opinions about particular Supreme Court nominations on the outcomes of the confirmation proceedings for those nominations.

### A. Labeling

One likely alternative for measuring the connection between public characterizations of a Supreme Court nominee's likely judicial philosophy and the outcomes of the confirmation proceedings for the nominee is labeling, which has been studied at length by sociologists.<sup>18</sup> Labeling refers to the process by which someone or some attribute is characterized or categorized as a deviation from a trait or property shared by, or reflected in, a group or social norm.<sup>19</sup> Labeling purports to describe the way a "social response to deviance can profoundly affect how people are perceived and how they perceive themselves."<sup>20</sup> As an academic exercise, labeling seeks to explain the resulting "patterns of deviance" from a supposedly normal pattern of behavior.<sup>21</sup> According to labeling theorists, feedback from social interaction structures one's view of self.<sup>22</sup> If a person is viewed as deviant (socially or otherwise), this stigmatization "transforms one conception of self (normal) into another (deviant)."<sup>23</sup> Labeling might not only hurt people's self-image, but also might cause people to change their behavior to conform either to the label or to the norm from which they have supposedly deviated.<sup>24</sup> Labeling can suggest both to the persons labeled and to others that deviants are different from the norm of society in values, tastes, or preferences, and that interaction with the deviant(s) could be viewed as, or produce, conforming behavior or guilt by association.<sup>25</sup>

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18. See, e.g., Nanette J. Davis, *Labeling Theory in Deviance Research: A Critique and Reconsideration*, 13 SOC. Q. 447, 451-52 (1972).

19. HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 9 (1963). Sociologists refer to "labeling" as a process whereby some person(s) or group(s) confers a property upon an entity, such that the entity's identity is understood to include, or changes to embody, that property. See, e.g., *id.*; DAVID MATZA, *BECOMING DEVIANT* 181 (1969); Davis, *supra* note 18, at 451.

20. ALLAN G. JOHNSON, *THE BLACKWELL DICTIONARY OF SOCIOLOGY: A USER'S GUIDE TO SOCIOLOGICAL LANGUAGE* 167 (2d ed. 2000).

21. *Id.*

22. Davis, *supra* note 18, at 451-52.

23. *Id.* at 452.

24. *Id.* at 451-52, 454.

25. See *id.* at 454-55.



Because the labeling theory developed around the formation of a deviant, the current use of “labeling” in sociology has a negative connotation.<sup>26</sup> The purpose of a label is usually to create boundaries and categories and thus to construct our social world by defining norms.<sup>27</sup> Labels are often used by public “[o]fficials, politicians, journalists, activists and researchers . . . to help our analyses [of what they do] and to describe to others what [they] do.”<sup>28</sup> People label other people, or events, in order to satisfy certain needs and to formulate solutions to specific problems.<sup>29</sup> Such categorization is an efficient, “dynamic and political” way to try to identify how some person(s) have either deviated from a social norm or, as a result of the labeling, can be moved to conform to certain norms of behavior.<sup>30</sup>

An excellent example of labeling of judging is the characterization of some judges or judicial decisions as “activist.”<sup>31</sup> This label is invariably pejorative and is meant to convey that a judge, justice, judicial opinion, or nominee has deviated from preferred or normal standards of judicial performance.<sup>32</sup> Activists, by definition, are deviants from normal judging.<sup>33</sup>

### B. Framing

Another possible way to measure concerted efforts to influence opinions, discourse, or outcomes in Supreme Court confirmation proceedings is framing, which is widely studied in political science and sociology.<sup>34</sup> Framing refers to the strategic, organized efforts by groups to create shared understandings of particular subjects in order to motivate collective action.<sup>35</sup> The concept of framing derives from the

26. See *id.* at 451; Michael Petrunik, *The Rise and Fall of “Labelling Theory”: The Construction and Destruction of a Sociological Strawman*, 5 CANADIAN J. SOC. 213, 214 (1980).

27. Joy Moncrieffe, *Labelling, Power and Accountability: How and Why ‘Our’ Categories Matter*, in THE POWER OF LABELLING: HOW PEOPLE ARE CATEGORIZED AND WHY IT MATTERS 1, 1 (Joy Moncrieffe & Rosalind Eyben eds., 2007).

28. Rosalind Eyben, *Afterword: Changing Practice*, in THE POWER OF LABELLING: HOW PEOPLE ARE CATEGORIZED AND WHY IT MATTERS, *supra* note 27, at 177, 177.

29. *Id.*

30. *Id.*

31. Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585, 599-600, 617 (2002); see also Keenan D. Kmiec, Comment, *The Origin and Current Meanings of “Judicial Activism”*, 92 CALIF. L. REV. 1441, 1447, 1459, 1472-73 (2004) (discussing the history of the term “judicial activism” (internal quotation marks omitted)).

32. Kmiec, *supra* note 31, at 1466-67.

33. *Id.* at 1475-76.

34. Judith D. Fischer, *Framing Gender: Federal Appellate Judges’ Choices About Gender-Neutral Language*, 43 U.S.F. L. REV. 473, 484-85 (2009).

35. Neal Caren, *Political Process Theory*, in 7 THE BLACKWELL ENCYCLOPEDIA OF

principle that meanings do not “automatically attach themselves to . . . objects, events, or experiences . . . but arise, instead, through interpretive processes mediated by culture.”<sup>36</sup> In the context of political discourse, framing “has to do with choosing the language to define a debate and, more important, with fitting individual issues into the contexts of broader story lines.”<sup>37</sup> Social movements, their participants, and their adversaries regularly use framing to unify or mobilize social movements or counter-movements.<sup>38</sup> In order to “construct a shared frame,” people are likely to use a combination of methods, including “media discourse,” “popular wisdom,” and “experiential knowledge.”<sup>39</sup> Framing has become widely regarded as a central dynamic in understanding the nature and course of social movements. Particularly large social movements use master frames to similar effect, such as “civil rights,” “women’s [rights],” or “affirmative action.”<sup>40</sup>

Labeling can sometimes be an “act of framing.”<sup>41</sup> When a label becomes successful and commonly used, those with alternative frames find the term difficult to avoid. As one scholar suggests, “[t]hose with a different frame may try to distance themselves from such a label by the use of *so-called* and quotation marks, but if they want to communicate their subject matter to a general audience, they will find it difficult to avoid established labels.”<sup>42</sup>

Moreover, as James Gibson and Gregory Caldeira suggest in their empirical analysis of public influence in the confirmation process, “competing frames are typically available in the political marketplace, and the battle for public support of the nominee is often, if not typically, a battle of one frame against another.”<sup>43</sup> They suggest further that, “in a contentious confirmation [such as Justice Alito’s], the American people confront two competing *frames* for evaluating nominees: the frames of judiciousness [referring to the nominee’s ability to apply the law neutrally or impartially to resolve particular disputes] and of ideology and partisanship.”<sup>44</sup>

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SOCIOLOGY 3455, 3456 (George Ritzer ed., 2007).

36. David A. Snow, *Framing and Social Movements*, in 4 THE BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY 1780, 1780 (George Ritzer ed., 2007).

37. Matt Bai, *The Framing Wars*, N.Y. TIMES, July 17, 2005, § 6 (Magazine), at 38.

38. WILLIAM A. GAMSON, TALKING POLITICS 7 (1992).

39. *Id.* at 117, 125.

40. *Id.* at 9 (discussing the frame of affirmative action); Snow, *supra* note 36, at 1781 (discussing the master frames of civil rights and women’s rights).

41. GAMSON, *supra* note 38, at 9.

42. *Id.*

43. JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE 70 (2009).

44. *Id.* at 65.

### C. Branding

Branding is another option for illuminating how political leaders influence the rhetoric over, and outcomes in, Supreme Court confirmation proceedings. To specialists in trademark law, branding refers to the packaging of a product or service in such a way as to convey particular information about it.<sup>45</sup> The purposes of branding are varied, and include, but are not limited to, serving as source identifiers (informing consumers of the companies or people who produce particular products), providing narratives about products (stories about products that are appealing to consumers), serving as repositories of meaning about particular products, signaling or conveying messages about particular products, and creating or cultivating an identity for the people who use or buy particular products.<sup>46</sup>

The significance of branding depends on a collective enterprise, entailing the interaction of four different sets of people:

[C]ompanies [the mark owners], the culture industries, intermediaries (such as critics and retail salespeople), and customers (particularly when they form communities). . . .

....

Marketers often like to think of brands as a psychological phenomenon which stems from the perceptions of individual consumers. But what makes a brand powerful is the collective nature of these perceptions; the stories have become conventional and so are

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45. See Ben Kleinman, *Luxury Markets, Antitrust, and Intellectual Property: An Introduction*, 90 J. PAT. & TRADEMARK OFF. SOC'Y 742, 746 & n.17 (2008); see also Magid et al., *supra* note 10, at 1 ("Trademark law now endorses the branding efforts of trademark owners." (footnotes omitted)).

46. A brand affiliates a set of products with a single source. See Rogers, *supra* note 15, at 176, 182. The use of a brand acts as a repository of meaning about particular products, such that one brand might be associated with dozens of products. See HOLT, *supra* note 7, at 3-4. Courts have found it fit to protect the accumulated meaning of such brands by preventing their unauthorized use. *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 31 (1st Cir. 1987) ("The threat of tarnishment arises when the goodwill and reputation of a plaintiff's trademark is linked to products which are of shoddy quality or which conjure associations that clash with the associations generated by the owner's lawful use of the mark . . ."). Recent marketing wisdom instructs companies to link their products to consumers by aligning their brands with popular narratives. See, e.g., HOLT, *supra* note 7, at 37-38 ("The brand is a historical entity whose desirability comes from myths that address the most important social tensions of the nation."). Brands thus appeal to the consumer in the sense that the consumer's identity might be enhanced by taking on the brand's meaning. The identifying aspect of branding is most interesting when the consumer equates purchase of the product with participation in a political cause, such as the American Revolution (by purchasing beverages other than tea) or simply going shopping during a depression. See Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 907-08 (2004) ("The history of American marketplace activity includes many examples of specifically targeted consumption choices that linked purchasing power with political causes.").

continually reinforced because they are treated as truths in everyday interactions.<sup>47</sup>

The fourth of these groups includes consumers, who are instrumental in investing a particular brand with meaning before it can reflect pervasive cultural salience.<sup>48</sup>

There are obvious analogues in the realm of Supreme Court selection to the different groups who determine a brand's significance in the commercial context. The "mark owners"—the persons who have ownership claims to particular brands<sup>49</sup>—are the political elites who create or promote brands, including presidents who make Supreme Court nominations, the officials who assist the president in making or promoting the nominees, the media elite, and perhaps members of Congress and the other political leaders who are interested in vindicating or opposing particular styles of judging or judicial decisions. The "culture industries" are the interest groups and the political parties, who are invested in the meanings of particular brands and in applying particular brands to the judiciary, nominees, justices, judges, or judicial decisions. The "intermediaries" are the media and the Internet. The "customers" include the Senate, the legal community, and the American public. As the next Part suggests, branding may have comparative advantages over labeling and framing in explaining the nature and substance of conflicts over Supreme Court nominations.

### III. THE DYNAMIC OF CONSTITUTIONAL BRANDING

While labeling, framing, and branding have in common the fact that they all seek to over-simplify a complex world and to steer collective action, branding has some analytical advantages over both framing and labeling. Branding is not limited in the ways in which either labeling or framing are. Whereas labeling is strictly negative, branding and framing are not; they can be positive or negative, i.e., they can fortify certain notions or understandings and not just mark deviations from particular norms.<sup>50</sup> Framing generally pertains to large-scale social movements, and thus requires or depends on a mass organization of people, whereas labeling and branding do not; they can function on a broad or intimate

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47. HOLT, *supra* note 7, at 3.

48. *See id.* For an article analyzing the importance of consumer investment to the value of a trademark, see Deborah R. Gerhardt, *Consumer Investment in Trademarks*, 88 N.C. L. REV. 427 (2010).

49. U.S. PATENT & TRADEMARK OFFICE, BASIC FACTS ABOUT TRADEMARKS 1 (2010).

50. *See supra* text accompanying notes 19-25, 35-42, 45; *supra* note 46 and accompanying text.

scale.<sup>51</sup> Framing entails structuring or channeling a dialogue or debate, but branding is not so limited, for it can do either the same thing or the opposite—cut off, or curtail, debate or discussion.<sup>52</sup> Moreover, branding has a lexicon that readily applies what we know about public attitudes and judging. For example, brands can produce rival or counter-brands, such as “the living Constitution” as an alternative to “originalism,” or “strict construction.”<sup>53</sup> They can be challenged, just as commercial advertising may be, as misleading, deceptive, or false, as was the case with President George H.W. Bush’s characterization of Clarence Thomas as “the best qualified” candidate to replace retiring Justice Thurgood Marshall.<sup>54</sup>

There are many excellent examples of brands of judging. First, “activist” is not just a pejorative label, but it can also frame debate and be a negative or derogatory brand.<sup>55</sup> It aims to characterize or categorize a judge, justice, style of judging, or judicial decision as unprincipled or grounded on personal or political preferences rather than the law.<sup>56</sup> “Activism” is, as Stephanie Lindquist and Frank Cross have noted in their recent, excellent survey of the intellectual origins of the brand and the history of its practice or manifestation over time:

a loaded term, fraught with multiple meanings and politicized connotations. . . . Nevertheless, concerns over judicial activism have existed since the founding of the United States. For the most part, those who decry activist decisions [or judges] focus on the judiciary’s usurpation of political power from the elected branches, especially when those judges render those decisions in accordance with their own policy preferences.<sup>57</sup>

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51. See *supra* text accompanying notes 19-25, 35-40, 45; *supra* note 46 and accompanying text.

52. See *supra* text accompanying notes 35-40, 45; *supra* note 46 and accompanying text.

53. See PETER ZAVODNYIK, *THE AGE OF STRICT CONSTRUCTION: A HISTORY OF THE GROWTH OF FEDERAL POWER, 1789-1861*, at 1 (2007); Richard Primus, *Limits of Interpretivism*, 32 HARV. J.L. & PUB. POL’Y 159, 173 (2009); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976) (internal quotation marks omitted); see also *infra* text accompanying notes 112-21.

54. O’BRIEN, *supra* note 9, at 78-80 (internal quotation marks omitted); *Excerpts from News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991, at A14; see also Editorial, *Justice Thomas: On What Basis?*, N.Y. TIMES, Sept. 22, 1991, § 4, at 16 (“He is a competent though recent judge on the U.S. Court of Appeals in Washington. But he is not, as President Bush so glibly proclaims, ‘the best man for the job on the merits’ regardless of race.”); *Excerpts from Senate Debate on Thomas Nomination*, N.Y. TIMES, Oct. 16, 1991, at A18 [hereinafter *Excerpts from Senate Debate*] (“Judge Thomas is not the best qualified American to be on the Supreme Court, as claimed by the President.” (emphasis added)).

55. See Kmiec, *supra* note 31, at 1466-67, 1473.

56. See *id.* at 1466-67, 1475-76.

57. STEFANIE A. LINDQUIST & FRANK B. CROSS, *MEASURING JUDICIAL ACTIVISM* 1 (2009).

Second, Republican leaders over the past few decades have been especially adept at contrasting what “activists” do to what principled judges do—“interpreting law and not making law.”<sup>58</sup> This brand is meant to convey something positive, so that judges, justices, or judicial decisions branded as appropriately “interpreting the law” are thought to follow proper methodologies and be grounded legitimately in the law.<sup>59</sup> Understood in this manner, the brand has been used effectively on behalf of Republican nominees, since it captures for many people the essence of what judges do.<sup>60</sup> The promotion of this brand also serves to convey that the judicial decisions with which conservatives or Republicans do not approve, or the judges or justices whom they do not support, are making law inappropriately—that they are legislating from the bench rather than doing their duty to merely “interpret the law.”<sup>61</sup>

Third, the brand “judicial restraint” has always meant to convey something positive about judging and the opposite of “activism,”<sup>62</sup> but the particular elements of the kind of judging qualified as “judicial restraint” have not been fixed. Over the years, it has referred in the late nineteenth and early twentieth century to the opposite of economic due

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For another recent take on the “activism” of the Court, see generally THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* ch. 6 (2004), pointing out the ways in which the Rehnquist Court actively exercised its power of judicial review.

58. See ABRAHAM, *supra* note 1, at 298-99, 337, 367 (internal quotation marks omitted) (discussing the desires of Presidents Nixon, Reagan, and George H. W. Bush to nominate Justices who were strict constructionists and would interpret, rather than make the law); see also Kmiec, *supra* note 31, at 1471 (noting that President George W. Bush wanted to appoint people who “interpret the law, not try to make law and write law” (internal quotation marks omitted)).

59. See Kmiec, *supra* note 31, at 1466-67 (stating that judges who try and make law rather than interpret the law are ignoring controlling precedent and discounting *stare decisis*).

60. See ABRAHAM, *supra* note 1, at 298-99 (stating that President Nixon successfully appointed four Justices whom he felt would be conservative and take care of the Constitution rather than impose their viewpoints on the American people); see also Robert Justin Lipkin, *We Are All Judicial Activists Now*, 77 U. CIN. L. REV. 181, 182 (2008) (“Both conservatives and liberals demonize so-called ‘activist judges’ whenever it suits their purpose.”); Primus, *supra* note 53, at 160 n.3 (“[O]ne paradigmatic foil for the textualist judge is the activist judge who foists his own values on an unwilling citizenry, and there is good reason to expect that activist judge to face a great deal of public criticism . . .”); Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 570 (2007) (“The partisan rhetoric of the activism wars has been so successful that the A.B.A. Journal has reported that a majority of Americans see a crisis of judicial activism.”); Martha Neil, *Half of U.S. Sees “Judicial Activism Crisis”*: ABA Journal Survey Results Surprise Some Legal Experts, ABA J. EREPORT, Sept. 30, 2005, available at <http://canadacourtwatch.com/Newspaper%20Articles/2005Sept30%20-%20Half%20of%20US%20sees%20judicial%20activism%20crisis.pdf> (finding that when judges infuse their own values and ignore the law they should be criticized).

61. See Kmiec, *supra* note 31, at 1471.

62. See Gerhardt, *supra* note 31, at 593-95.

process,<sup>63</sup> deferring to democratic authorities such as legislatures,<sup>64</sup> following original meaning in constitutional interpretation, and committing to decide cases based on the law and not personal or political preferences.<sup>65</sup> By the time President George W. Bush came into office in 2001, Republicans had largely abandoned the brand of “judicial restraint” in favor of having judicial nominees who were committed to “interpret[ing] the law, not try[ing] to make the law.”<sup>66</sup> These shifts in the meaning of “judicial restraint” reflect a common dynamic in branding—namely, that the narrative or the story associated with a particular brand might change over time.

A fourth brand was “law and order” judges, through which President Nixon meant to convey something both positive about the nominees, and negative about the Warren Court that he had attacked in his successful 1968 presidential campaign.<sup>67</sup> On the one hand, the brand was meant to suggest that Nixon’s judicial nominees would be deferential to local authorities, including prosecutors and juries in criminal cases, rather than sympathetic to criminal defendants.<sup>68</sup> On the other hand, it was meant to suggest that the Warren Court had been irresponsibly allowing convicted criminals to go free.<sup>69</sup>

Last but not least, a brand that has been promoted in critical response to some recent, liberal Supreme Court decisions is “American exceptionalism.”<sup>70</sup> This brand was advanced as a reference to, or embodiment of, the view that the Constitution should be interpreted on the basis of its original meaning and the unique American experiences which gave rise to its drafting and which are undermined when justices rely on foreign law to guide its interpretation.<sup>71</sup> The brand of “American exceptionalism” both symbolized and reinforced Justice Scalia’s harsh criticisms of two Supreme Court decisions in which the majority had

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63. See *id.* at 591-93.

64. *Girouard v. United States*, 328 U.S. 61, 79 (1946) (Stone, C.J., dissenting) (“It is not the function of this Court to disregard the will of Congress in the exercise of its constitutional power.”); ABRAHAM, *supra* note 1, at 222-23 (discussing Justice Frankfurter’s strongly held belief of judicial restraint and deferral to the democratically elected legislature, as applied to economic as well as social legislation).

65. Gerhardt, *supra* note 31, at 627 n.212.

66. Kmiec, *supra* note 31, at 1471.

67. ABRAHAM, *supra* note 1, at 14, 300-02 (internal quotation marks omitted).

68. See *id.* at 14, 301-02.

69. *Id.* at 301-02.

70. Steven G. Calabresi, “*A Shining City on a Hill*”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1345 (2006).

71. See *id.* 1405-12 (detailing the evolution of American constitutional law and linking it to “American exceptionalism”).

relied in part on foreign law in construing the Constitution.<sup>72</sup> Proponents of the brand contrast “American exceptionalism” with an activist approach to judging that they believe relies on foreign law illegitimately as a basis for interpreting the Constitution.<sup>73</sup>

Branding is a natural, if not inevitable, consequence of the design of the Constitution, which vests the power over judicial selection to presidents and senators,<sup>74</sup> and which ensures, through the First Amendment, robust debate over issues of political salience, including judicial nominations, styles of judging, and judicial decisions.<sup>75</sup> But, the potency of branding judicial nominations, judicial decision-making, and judicial nominees is likely to undermine the sophisticated understanding of the law that Barry Friedman and Andrew Martin have urged social scientists to use in modeling.<sup>76</sup> Branding has the power to shape, and thus to distort, public understanding of the law, particularly to lead the public to think that judges or justices do not respect the values usually or commonly associated with the rule of law.<sup>77</sup> In ways that will complicate or impede a general understanding of the judicial function, branding may blur the distinction between judges and non-judicial officials; and it may

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72. See *Roper v. Simmons*, 543 U.S. 551, 626-28 (2005) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting). In *Roper*, Justice Scalia added:

The Court’s parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. “Acknowledgment” of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court’s judgment—which is surely what it parades as today.

*Id.* at 628.

73. See Calabresi, *supra* note 70, at 1398, 1412 (finding a “tendency of Americans to view defining the Constitution as central to defining America’s exceptional mission in the world,” so that “for the Court to follow obscure implications of caselaw . . . outrages the public”).

74. U.S. CONST. art. II, § 2, cl. 2 (“[The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .”).

75. See U.S. CONST., amend. I.

76. See generally Barry Friedman & Andrew D. Martin, *Looking for Law in All the Wrong Places: Some Suggestions for Modeling Legal Decision-Making*, in *WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT’S AT STAKE* 143 (Charles Gardner Geyh ed., 2011) (detailing the inherent difficulty in modeling law due to differing courts, dynamic precedent, and the difference between an outcome of a case and a court-drafted opinion).

77. See Richard H. Fallon, Jr., “*The Rule of Law*” *As a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 2-3 (1997). Fallon identifies the most popular conception of the rule of law by comparing the notion of the rule of law with the rule of men:

Within perhaps the most familiar understanding of this distinction, the law—and its meaning—must be fixed and publicly known in advance of application, so that those applying the law, as much as those to whom it is applied, can be bound by it. If courts (or the officials of any other institution) could make law in the guise of applying it, we would have the very ‘rule of men’ with which the Rule of Law is supposed to contrast.

*Id.*



suggest a clearer, more precise distinction between law and politics than might actually be the case in practice.<sup>78</sup> Branding has the further effect of obscuring the fact that in practice, the federal appointments process tends to filter out really bad nominations as opposed to ensuring or mandating any single brand of judging. The Constitution makes possible and legitimizes a process for filtering brands, a process in which there is, or at least can be, a vigorous debate infused with politics, however defined, over judicial independence and accountability.<sup>79</sup>

The fact that the First Amendment protects branding in both commercial and political contexts provides an additional basis for analogizing the branding of products to the branding of nominations. To be sure, the First Amendment does not provide as much protection to commercial speech as it does to political speech; it allows regulation of misleading, false, or deceptive advertising,<sup>80</sup> even though it vigorously protects political hyperbole unless it is directed at inciting imminent lawless behavior and it is likely to produce or incite such lawless behavior.<sup>81</sup> Nevertheless, the First Amendment ensures a wide swath for both the advertising of products and counter-advertising for competing products.<sup>82</sup> Even more so in the political context, the First Amendment ensures that the contending sides in fights over Supreme Court nominations have considerable latitude to exploit deceptive, misleading brands in their cause and to seek to thwart such branding through counter-advertising.<sup>83</sup> The First Amendment further ensures robust political advocacy on the part of political leaders, interest groups, academics, and citizens about what judges do.<sup>84</sup> It allows, in other words, the branding of politically salient judicial decisions such as *Roe v. Wade*.<sup>85</sup> Brands can therefore be used to signal approval of, or to

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78. See, e.g., Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1679-83 (2004) (positing that judicial independence is simply what remains after the interplay between Article III protections of the judiciary and congressional efforts to influence the judiciary); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 339-40 (1999) (arguing that judicial independence “is not an operative legal concept, but rather a way of describing the consequences of legal arrangements”).

79. See U.S. CONST. art. II, § 2, cl. 2; see, e.g., *Excerpts from Senate Debate*, *supra* note 54, at A18 (stating that the Senate need not be a rubber stamp of a nominee and has a right to debate about and reject nominees).

80. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of NY*, 447 U.S. 557, 562-64 (1980).

81. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

82. See *Cent. Hudson Gas & Elec.*, 447 U.S. at 561-64.

83. See *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

84. See *id.* at 14-15.

85. 410 U.S. 113 (1973); see also Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL’Y 519, 535 (2008) (describing pro-choice scholars branding the *Roe* decision as one decided with poor legal reasoning).

denigrate, particular judges, styles of judging, or judicial decisions. The next Part examines the prevalence of, and political purposes motivating, three popular brands of judging.

#### IV. THREE POSITIVE BRANDS

In this Part, I examine in some detail three brands of judging that have been employed (and criticized) in one or more of the three last Supreme Court confirmation hearings and in public commentaries on judges, judging, and judicial decisions since John Roberts's appointment as Chief Justice in 2005. These brands are "strict construction," "umpiring," and "real-world judging." Each of these is meant to be a positive brand of judging (i.e., to rally support for a particular nominee, construction of the Constitution, or judge or justice); each purports to be neutral, as well as superior to, and more principled than, a rival or competing brand; and each has been open to the challenge of being deceptive or misleading. Moreover, each has been employed in public rhetoric or debates about judging; none appear in any official opinion of any justice since the advent of the Roberts Court.<sup>86</sup> The fact that the justices do not use them suggests that they prefer to use a different language in their opinions than that which is used in political debates or forums about judging. Justices apparently conceive of their functions as different from that of politicians, interest group leaders, pundits, or others who are seeking to achieve or shape outcomes in the political process. These brands are used, in other words, purely for political purposes, which have ramifications for public understanding of, and public confidence in, judging.<sup>87</sup>

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86. A LexisNexis search for "umpire" or "real-world judging" within Supreme Court opinions since October 3, 2005 (when Chief Justice Roberts's term began) produced no results. The term "strict construction" appeared in only four Supreme Court opinions.

87. We can measure the prominence (or frequency) of some branding in Senate hearings, floor statements, presidential statements, and public discourse (e.g., newspapers, radio, network and cable television); however, the traction of branding might depend on other factors, such as the strength of a particular nominee's professional credentials, the composition of the Senate, and whether the same party controls the White House and the Senate. Nor, of course, can anyone prove a negative, so it is impossible to show that a nomination would have fared differently if there had been different branding. Nevertheless, we can infer from its use throughout history that branding is important to political leaders, just as it is important to the owners of trademarks. So, it is possible that the frequency of branding in the public statements of presidents and senators on particular nominees or judicial decisions might reflect that they think it is important to either a nomination's fate or to the institutional and public support that a judicial decision might need to endure. It is also possible that the potential of branding to influence outcomes turns, as I have suggested, on other things, such as an audience or constituency, particularly in the Senate, that is open to—and has the power to act on—the messages conveyed by the branding.

### A. *Strict Construction*

“Strict construction” is one of the most popular and enduring brands of judging in American history. The brand was initially employed by the founders of the Republican Party, particularly Thomas Jefferson and James Madison.<sup>88</sup> The brand continued to be used by subsequent presidents who purported to be following their philosophies, including Andrew Jackson, Martin Van Buren, John Tyler, Franklin Pierce, and James Buchanan.<sup>89</sup> In this era, these presidents successfully nominated to the Court seventeen people whom they or their supporters described as “strict constructionists.”<sup>90</sup> This brand was distinct from, and offered as an alternative to, the Federalist brand of judging closely associated with the Marshall Court’s broad constructions of federal power at the expense of state sovereignty.<sup>91</sup> The brand of “strict construction” took hold in part because Presidents Jefferson, Madison, and James Monroe were popular, two-term presidents<sup>92</sup> whose political party dominated the Senate during their respective tenures.<sup>93</sup> Consequently, their nominees faced little opposition of consequence.<sup>94</sup> Andrew Jackson, next, fought fierce battles to ensure the appointments of his “strict constructionists”

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88. ZAVODNYIK, *supra* note 53, at 131, 198.

89. *Id.* at 177, 187, 300, 309-10; *Martin Van Buren, 8th Vice President (1833-1837)*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/generic/VP\\_Martin\\_VanBuren.htm](http://www.senate.gov/artandhistory/history/common/generic/VP_Martin_VanBuren.htm) (last visited July 27, 2012).

90. *Supreme Court Nominations, Present-1789*, *supra* note 2; see also ABRAHAM, *supra* note 1, at 96-100, 104, 107, 113-14 (describing the views and beliefs of the Court nominees).

91. See ZAVODNYIK, *supra* note 53, at 1-2, 104-05 (“Americans embraced strict constructionism in order to ensure that Congress would exercise only those powers that had been granted to it with the ratification of the Constitution—the remaining prerogatives of government were to remain with the states.”); see also *Resolves of the Legislatures of New York*, in STATE PAPERS ON NULLIFICATION 131, 136 (Boston, Dutton & Wentworth 1834) (“The Committee are advocates for the reserved rights of the States, and a strict construction of the Constitution of the United States.”); 1 WILLIAM BLACKSTONE, COMMENTARIES app. Note D, at 152. According to Blackstone:

Since each state in becoming a member of a federal republic retains an uncontrolled jurisdiction over all cases of municipal law, every grant of jurisdiction to the confederacy, in any such case, is to be considered as special, inasmuch as it derogates from the antecedent rights and jurisdiction of the state making the concession, and therefore ought to be construed strictly, upon the grounds already mentioned.

*Id.*

92. ABRAHAM, *supra* note 1, at 51, 67; *American President: Biography of James Madison*, MILLER CENTER, <http://millercenter.org/president/madison/essays/biography> (last visited July 27, 2012); *American President: Biography of James Monroe*, MILLER CENTER, <http://millercenter.org/president/monroe/essays/biography> (last visited July 27, 2012).

93. ABRAHAM, *supra* note 1, at 51; *Party Division in the Senate, 1789-Present*, U.S. SENATE, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited July 27, 2012).

94. See ABRAHAM, *supra* note 1, at 85-92; *Supreme Court Nominations, Present-1789*, *supra* note 2.

to the Court.<sup>95</sup> While in 1835 the Senate refused to confirm his advisor and Attorney General Roger Taney as Associate Justice,<sup>96</sup> his success, shortly thereafter, in appointing Taney as Chief Justice,<sup>97</sup> revived the brand's vitality.<sup>98</sup>

Subsequent nominees, branded as "strict constructionists," faced stiff opposition in the antebellum era. Hence, President Tyler's use of the brand did little to help his nominees.<sup>99</sup> Tyler was hugely unpopular in the Senate because the Whigs hated him for abandoning their Party's principles during his short presidency.<sup>100</sup> This undermined his nominees among senators who did not like Tyler, while the Whigs, who controlled the Senate, wanted to preserve the vacancies for the next president.<sup>101</sup> The Senate rejected or otherwise blocked eight of Tyler's nine nominations to the Supreme Court.<sup>102</sup> The only nomination of his that the Senate approved was of a Democrat, Samuel Nelson, who was widely admired and was not known as a "strict constructionist."<sup>103</sup> Moreover, by the time that James Buchanan was elected president, "strict construction" had become increasingly linked to supporting the slave power,<sup>104</sup> so that the narrative and positive images associated with the brand were eroding. Hence, the Senate approved Buchanan's only nomination to the Court, Nathan Clifford, a "strict constructionist" who had defended slavery, by one of the slimmest margins in American history.<sup>105</sup> One of the ensuing casualties of the Civil War and Reconstruction was the positive meaning associated with "strict construction."<sup>106</sup> President Abraham Lincoln's election, and the rise of the Republican Party, reflected a movement away from "strict construction"—a move that was already developing at the time of the razor-thin confirmation of Justice Clifford—to the appointments of justices who were not hostile to federal power or reflexively protective

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95. See ABRAHAM, *supra* note 1, at 98-101.

96. *Id.* at 99-100.

97. *Id.* at 99-101.

98. See *id.* at 101.

99. *Id.* at 40; ZAVODNYIK, *supra* note 53, at 187.

100. Louis C. James, *Senatorial Rejections of Presidential Nominations to the Cabinet: A Study in Constitutional Custom*, 3 ARIZ. L. REV. 232, 241-47 (1961) ("[Clay] viewed those who supported the President as 'a low, vulgar and profligate cabal.'").

101. See ABRAHAM, *supra* note 1, at 106-07; *Party Division in the Senate, 1789–Present*, *supra* note 93.

102. ABRAHAM, *supra* note 1, at 106-07; *Supreme Court Nominations, Present–1789*, *supra* note 2.

103. ABRAHAM, *supra* note 1, at 107 (Justice Nelson "serve[d] diligently and perceptively for almost three decades—generally in a manner anticipated by, and pleasing to, the Jacksonians.").

104. *Id.* at 113; ZAVODNYIK, *supra* note 53, at 299.

105. See ABRAHAM, *supra* note 1, at 114.

106. See *id.* at 114, 116.

of state sovereignty.<sup>107</sup> The brand fell into relative disuse until Presidents William Howard Taft and Warren Harding revived it to signal their Supreme Court nominees' commitment to upholding property rights and skepticism of progressive economic regulations.<sup>108</sup> The brand became more popular with Richard Nixon, who used it to distinguish the ideological commitments of his nominees from the "liberal activism" of the Warren Court<sup>109</sup>—symbolized by *Brown v. Board of Education*<sup>110</sup> and other cases favoring minority rights and the rights of criminal defendants at the expense of state sovereignty.<sup>111</sup>

The most prominent efforts made in recent years to brand nominees positively as "strict constructionists" were made by President George W. Bush in the run up to, and near the time he was nominating, Chief Justice John Roberts and Justice Samuel Alito. President Bush used the brand to convey that his nominees were committed to following a different path than the liberal activists on the Burger and Rehnquist Courts—namely to construe congressional powers narrowly, to oppose or weaken abortion rights, and to allow more religion into public life.<sup>112</sup>

Yet, it is possible that the brand of "strict construction" did not enrich or fortify public understanding of, or confidence in, judging for several reasons. First, the purpose of the brand has never been to improve or refine public understanding of judging. To the contrary, it

107. See *id.* at 117, 120, 123, 125; *Party Division in the Senate, 1789–Present*, *supra* note 93.

108. See ABRAHAM, *supra* note 1, at 166-69, 186.

109. See Gerhardt, *supra* note 31, at 625-26; see also Editorial, *The Symbols of a Nomination*, WASH. POST, Jan. 21, 1970, at A18. The editorial noted that:

This nod has been underlined by the stress the White House has put on the attitude of mind it describes as "strict constructionist" and finds in both Judge Carswell and Judge Haynesworth. That phrase, whatever it may actually mean, implies in the South opposition to the Supreme Court's desegregation rulings and its use seems certain to encourage those who still think it is possible to shout, "Never."

*Id.* Nixon promised to appoint:

"[s]trict constructionists" who would see "their duty as interpreting law and not making law"; who would follow a "properly conservative" course of judging that would, in particular, protect society's "peace forces" against the "criminal forces"; and who would "see themselves as caretakers of the Constitution and servants of the people, not superlegislators with a free hand to impose their social and political viewpoints upon the American People."

Gerhardt, *supra* note 31, at 625-26.

110. 347 U.S. 483, 495 (1954).

111. ABRAHAM, *supra* note 1, at 258-61.

112. Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 557-66 (2010) (describing the origins of the popularity of judicial deference among conservative politicians and observing political motivations behind its use as a brand); *Bush: No Moderate Judges*, NEWSDAY (Nassau), Mar. 29, 2002, at A16 ("Bush said he wanted to appoint strict constructionists who would hew closely to the law rather than judicial activists whom he said were prone to 'legislate from the bench.' 'We want people to interpret the law, not try to make law and write law,' he said.").

has always been a code aimed at signaling nominees' narrow constructions of federal powers, most individual rights claims, and broad constructions of state sovereignty and private property claims.<sup>113</sup> Hence, it is meant to appeal only to certain constituencies, but not to a mass audience or the American people generally. Second, the narrative of "strict construction" is not perfectly positive.<sup>114</sup> "Strict construction" has been associated over the years, and been widely understood to be aligned with, some divisive or problematic positions in constitutional law, such as the constitutional entitlements of slave-owners and the right to contract<sup>115</sup> and opposition to the individual rights claims of homosexuals or women seeking to terminate their pregnancies.<sup>116</sup> Promoting this brand—pushing it too strongly—runs the risk of mobilizing the opposition forces to a "strict constructionist" reading of the Constitution. Third, with a solid majority of fifty-five Republicans in the Senate, and little or no meaningful prospect of a Democratic filibuster, President Bush and Republican senators had little or no incentive to expand on the particulars of the judicial philosophies of the President's nominees or to align Roberts or Alito with the historically problematic narrative of "strict construction."<sup>117</sup> In Roberts's confirmation hearings, Senator Lindsay Graham was the only Republican member of the Judiciary Committee to mention "strict construction" more than once (a total of four times), while Senator Orrin Hatch used it once.<sup>118</sup> In the Alito hearings, only two Republicans on the Committee mentioned "strict construction."<sup>119</sup> There was nothing Democrats could do to stop these nominations without the nominees or the White House making some

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113. See, e.g., Siegel, *supra* note 112, at 564.

114. In a LexisNexis search of law reviews published since 2005, I determined that "strict construction" of the Constitution, as an approach to judging, has been mentioned twenty-five times, thirteen of which were critical or negative references. While law reviews hardly influence or inform public discourse, these figures reflect the fact that the brand triggers or provokes relatively strong negative responses in some constituencies which have an interest in the quality of judging or judicial selection.

115. See ABRAHAM, *supra* note 1, at 101-02.

116. See *Lawrence v. Texas*, 539 U.S. 558, 605-06 (2003) (Thomas, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 172-73, 177 (1973) (Rehnquist, J., dissenting).

117. *Party Division in the Senate, 1789–Present*, *supra* note 93; *Supreme Court Nominations, Present–1789*, *supra* note 2.

118. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 35, 37, 251 (2005) [hereinafter *Roberts Hearing*] (statement of Sen. Lindsey O. Graham); *id.* at 158 (statement of Sen. Orrin G. Hatch).

119. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong., 35, 429 (2006) [hereinafter *Alito Hearing*] (statement of Sen. Lindsey O. Graham); *id.* at 465 (statement of Sen. Samuel D. Brownback).

serious mistakes, but they did not. Democrats were unable to raise the profile or salience of the brand through a contest; and the White House, Republican senators, and the nominees were not disposed to be obliging. Instead, in these hearings, Republican senators kept the attention off the brand “strict construction” and emphasized instead the professional accomplishments of the nominees and their characters.<sup>120</sup> The fact that the focus was elsewhere in the Roberts hearing was not a problem for “strict construction,” because the hearings were not meant to be a referendum on “strict construction.” In fact, the stage was being set for the emergence of a new brand, one that would grab the attention of the public and the media and arguably make the brand “strict construction” seem irrelevant. It is to this new brand that I turn in the next section.

### B. Umpiring

Both before and after his nomination as Chief Justice, John Roberts never embraced the brand of “strict construction.” Instead, at the outset of his testimony before the Senate Judiciary Committee, Chief Justice Roberts described his approach to judging as akin to “umpiring.”<sup>121</sup> Previously, “umpiring” had not been promoted as a brand of judging in any political or public forum, but Republican senators quickly rallied behind the brand: six Republicans on the Judiciary Committee mentioned the brand positively (or at least neutrally) sixteen times during Roberts’s hearings,<sup>122</sup> and Republicans referenced the brand sixty-two times in the hearings and on the Senate floor.<sup>123</sup> These

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120. See *Alito Hearing*, *supra* note 119, at 10, 336-37 (statement of Sen. Orrin G. Hatch) (emphasizing Alito’s character, reputation, and professional accomplishments); *id.* at 14 (statement of Sen. Charles E. Grassley); *id.* at 18-20, 372 (statement of Sen. Jon L. Kyl); *id.* at 28-29 (statement of Sen. Jefferson B. Sessions); *Roberts Hearing*, *supra* note 118, at 165 (statement of Sen. Orrin G. Hatch) (emphasizing Roberts’s character and professional accomplishments); *id.* at 201-03 (statement of Sen. Jon L. Kyl); *id.* at 229-30 (statement of Sen. Jefferson B. Sessions); *id.* at 249-50 (statement of Sen. Lindsey O. Graham); *id.* at 265 (statement of Sen. John Cornyn).

121. *Roberts Hearing*, *supra* note 118, at 55 (statement of John G. Roberts, Jr.).

122. *Id.* at 31, 237, 353, 523 (statement of Sen. Jefferson B. Sessions); *id.* at 46 (statement of Sen. Samuel D. Brownback); *id.* at 161 (statement of Sen. Orrin G. Hatch); *id.* at 177 (statement of Sen. Charles E. Grassley); *id.* at 195 (statement of Sen. Jon L. Kyl); *id.* at 266-67 (statement of Sen. John Cornyn).

123. *Id.* at 31, 237, 353, 523 (statement of Sen. Jefferson B. Sessions); *id.* at 46 (statement of Sen. Samuel D. Brownback); *id.* at 161 (statement of Sen. Orrin G. Hatch); *id.* at 177 (statement of Sen. Charles E. Grassley); *id.* at 195 (statement of Sen. Jon L. Kyl); *id.* at 266-67 (statement of Sen. John Cornyn); 151 CONG. REC. 20,891-92 (2005) (statement of Sen. Alan W. Allard); *id.* at 21,191, 21,648 (statement of Sen. William H. Frist); *id.* at 21,207 (statement of Sen. Orrin G. Hatch); *id.* at 21,279-80, 21,408 (statement of Sen. Jefferson B. Sessions); *id.* at 21,295 (statement of Sen. Kay B. Hutchinson); *id.* at 21,389 (statement of Sen. Gordon H. Smith); *id.* at 21,399 (statement of Sen. Conrad R. Burns); *id.* at 21,404-05 (statement of Sen. James M. Talent); *id.* at 21,407 (statement of Sen. David B. Vitter); *id.* at 21,407 (statement of Sen. James P. Bunning); *id.* at 21,417 (statement

references helped to raise the salience of the brand, which was reported at least once in every major newspaper story on the hearings and every major television and radio broadcast of the hearings.<sup>124</sup> Since the hearings, the brand seems to have retained some cultural significance or prominence, as reflected in the facts that a LexisNexis search of law reviews published after 2005 indicated that the term had been used twenty-five times (sixteen since 2008),<sup>125</sup> and was mentioned at least once in stories on judging published in every major newspaper during Justice Sonia Sotomayor's confirmation hearings in the summer of 2009.<sup>126</sup>

"Umpiring" has had strong appeal as a brand for several reasons. First, it has resonated with much of the public's likely understanding of the importance of impartiality in judging and the constitutional ideal of neutrality as an indispensable attribute of judges. Like umpires, judges are supposed to be neutral and not play favorites among the parties who appear before them. The brand of "umpiring" therefore neatly fits into a positive narrative of judging that is likely to have appeal to most people. Umpires are not supposed to be biased toward a party or to favor a particular outcome, and the same can be said of ideal judges. Umpires merely call the balls and strikes as they see them (as Roberts said in his confirmation hearings).<sup>127</sup> They stand apart from the game, are not invested in the outcome of the game in any way, and are otherwise uninvolved with—indeed, loathe to interfere at all with—the game. Third, the positive narrative of "umpiring" has reinforced, and is reinforced by, another brand popular among Republicans and

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of Sen. Robert F. Bennett); *id.* at 21,425 (statement of Sen. Charles E. Grassley); *id.* at 21,631 (statement of Sen. Chester T. Lott). These figures and the figures that I cite from later Supreme Court confirmation hearings are based on my readings of the transcripts of the Committee hearings and Senate floor debates on the Roberts, Alito, and Sotomayor nominations. In addition, my research assistants employed LexisNexis searches of major newspapers, broadcast transcripts, and law reviews to determine the numbers of times that the terms "strict construction," "activism," "activist," "umpiring," "empathy," and "real-world judging" were used. In our determinations of the numbers of times that references were made to "real-world judging," we treated references made to "real-world" as synonymous. We did not, for the sake of precision, count as synonymous to "real-world judging" references made to "realistic" or "reality-based" judging. There were only a few references made to each of the latter two, so the inclusion or exclusion of these was not likely to throw off the final tally significantly in one direction or another.

124. See, e.g., Robert Schwartz, Op-Ed., *Like They See 'Em*, N.Y. TIMES, Oct. 6, 2005, at A37 (criticizing the brand in a commentary on the nomination of Harriet Miers).

125. A LexisNexis search for "umpir!" in the "US Law Reviews and Journals, Combined" database, from January 1, 2006 to July 2, 2012, yielded these results.

126. See, e.g., Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 12, 2009 (Week in Review), at 1.

127. *Roberts Hearing*, *supra* note 118, at 56 (statement of John G. Roberts, Jr.).



conservatives—“interpreting, not making the law.”<sup>128</sup> This mutual reinforcement, or cross-branding, has fortified the positive narrative that many Republicans and political conservatives hoped that the brand would embody.

In spite of the strong endorsements that “umpiring” as a brand has received from some senators and pundits in public discourse about judging,<sup>129</sup> it possibly undermines public understanding of judging in several ways. First, it arguably gets umpiring wrong. Umpiring is not, as the narrative with which it is associated might suggest, merely mechanical, but involves substantial discretion. Indeed, umpiring might involve more discretion than judging. As one professional umpire argued in a widely read editorial published at the outset of Justice Sotomayor’s confirmation hearings, the strike zone does not stay the same in every game; it changes every game because of the umpire, who has the discretion to define and to enforce it.<sup>130</sup> The strike zone is what the umpire says it is. In contrast, the Constitution at least remains written and amendable only in accordance with its strict procedures.<sup>131</sup> Its written declarations—and meaning—are not supposed to change from case to case. Moreover, judging is not purely mechanical; it does not entail blindly or mindlessly applying a set of rules to a legal dispute. The cases that come before the Court tend to be the ones in which the interpretive rules are in dispute, or the law is in dispute or does not point to a single or easy answer. In addition, the brand of “umpiring” is arguably deceptive, because it masks the real agendas or ideological commitments of the judges who claim to be nothing more than neutral umpires. The fact is that judges and justices might be invested in particular interpretive methodologies that have little or no suitable counterpart in baseball. Fourth, the brand is meant to curtail any extended discussion of judging. The immediate, intuitive appeal of this brand is its point. Last but not least, justices do not stand apart from legal disputes in the same way that umpires stand apart from baseball. Umpires are not players in the game of baseball, but judges and justices are one of the principal constitutional authorities in the scheme of checks and balances set forth in the Constitution.<sup>132</sup> Hence, judges and justices are often called upon to determine the scope of their powers and the

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128. See *Comments by President on His Choice of Justice*, N.Y. TIMES, July 24, 1990, at A18 (quoting President Bush describing Justice Souter as “committed to interpreting, not making the law”).

129. Michael P. Allen, *A Limited Defense of (at Least Some of) the Umpire Analogy*, 32 SEATTLE U. L. REV. 525, 530 (2009).

130. Weber, *supra* note 126.

131. See Rehnquist, *supra* note 53, at 705.

132. U.S. CONST. art. III, §§ 1–2.

powers of the other branches, and what they say about the Constitution is, by design, extremely difficult to undo. In contrast, disputes over the powers of umpires are appealable to higher authorities, which are able to make changes to the rules of the game of baseball more easily than they may be made to the Constitution.<sup>133</sup>

However, the full impact of “branding” outside the confirmation process is unclear. First, the brand might retain some vitality, particularly in some quarters (as shown in Republican statements during the Sotomayor hearings),<sup>134</sup> but it could possibly not have as much as it could have had. Only a few months after Chief Justice Roberts’s confirmation, Justice Alito refused to use any label in describing his approach to judging.<sup>135</sup> In the proceedings on Justice Alito’s nomination, Republican senators mentioned “umpiring” positively only five times during Judiciary Committee hearings<sup>136</sup> and only four other times on the Senate floor.<sup>137</sup> In less than three years after his confirmation, Chief Justice Roberts seems to have distanced himself from the brand and fallen back on more broadly appealing, sophisticated descriptions of the judicial function in public statements.<sup>138</sup> Second, no justice has made references to the brand in any of their opinions on the Supreme Court.<sup>139</sup> The fact that the justices themselves do not usually employ brands in their opinions in all likelihood reflects their shared understanding of judicial opinion-writing as a different enterprise than policy-making.

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133. See Rehnquist, *supra* note 53, at 705.

134. *Confirmation Hearing on the Nomination of Sonia Sotomayor to Be an Associate Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7, 137 (2009) [hereinafter *Sotomayor Hearing*] (statement of Sen. Lindsey O. Graham) (reflecting Republican senators referencing the brand by way of using the terms “balls and strikes”).

135. Senator Sam Brownback said to then-Judge Alito, “I just want to get your thoughts of how you view the Constitution . . . [t]here are these different schools of thought on this of strict constructionist, living document, originalist, and there are several others that float around out there. How do you generally look at the Constitution?” *Alito Hearing*, *supra* note 119, at 465 (statement of Sen. Samuel D. Brownback). Alito failed to designate a specific label to his method of judging. *Id.*

136. *Id.* at 10 (statement of Sen. Orrin G. Hatch); *id.* at 14 (statement of Sen. Charles E. Grassley).

137. 152 CONG. REC. 48, 211, 348 (2006) (statement of Sen. Jefferson B. Sessions); *id.* at 60 (statement of Sen. Mel Martinez); *id.* at 167 (statement of Sen. James M. Talent); *id.* at 169 (statement of Sen. David B. Vitter).

138. See, e.g., CHIEF JUSTICE ROBERTS, 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3-4 (2008), available at <http://www.supremecourt.gov/publicinfo/year-end/2007year-endreport.pdf>; Erwin Chemerinsky, *Seeing the Emperor’s Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1077 (2006); Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23, 46-47 (2007); Roberts, *supra* note 60, at 570 (criticizing Roberts’s use of “umpire[]” for being an overly simplistic criticism against those “activist” judges who unfairly “control the outcome of the game by altering the strike zone” (internal quotation marks omitted)).

139. A LexisNexis search for “umpire” (or “umpir!”) within Supreme Court opinions since 2005 (the year Chief Justice Roberts’s term began) produced no results.

Brands are partisan; they are not judicial rhetoric about judging. Third, it is unclear how much the public is listening to, or being influenced by, the promotion of “umpiring” as a brand of judging. It is possible that the people who watch or follow Supreme Court confirmation proceedings already have fixed views about the nominee or judging. Moreover, the public might discount political rhetoric about particular judges or judging, or have different opinions about the quality of the judiciary or judging generally than they do about particular justices or decisions. It might also be true that branding might simply appeal to the faithful party as opposed to the public at large. But, if branding has little or no sway on public opinion about, or confidence in, judging, we should find out the factors that do influence public confidence in judging. Fourth, the relative absence of criticisms of the brand of “umpiring” in the Alito hearings (Democratic senators mentioned it only five times)<sup>140</sup> did not necessarily inure to the benefit of the brand. Instead, during and after the Alito hearings, Democratic senators sounded themes they rolled out in 2009 as a rival, competing brand of judging. In the next section, I consider the possible significance of the emergence of a rival brand to “umpiring.”

### C. Real-World Judging

In the weeks leading up to his first Supreme Court nomination, President Barack Obama emphasized that he wanted his nominee to have “empathy” and to understand how the law worked “in the real world.”<sup>141</sup> Although the President might have meant for these terms to merely describe the qualities that he would like for his Supreme Court nominee to have, “empathy” and “real-world” could be construed as sub-brands, or as falling within a house brand. The house brand could have been Democratic or President Obama’s judges or Justices. More specifically, “empathy” conveyed at least two things about President Obama’s Supreme Court nominee—one positive and the other negative. On the one hand, it implied that President George W. Bush’s two appointees (if not most of the Republican Justices sitting on the Roberts Court) were not empathetic, but rather were indifferent to the real-world consequences of their judging. “Empathy” further conveyed that an Obama nominee would have the disposition, temperament, and skills to

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140. *Alito Hearing*, *supra* note 119, at 37 (statement of Sen. Charles E. Schumer); *id.* at 378, 379, 606 (statement of Sen. Herbert H. Kohl).

141. *Obama: Aim for Fundamental Change*, DETROIT FREE PRESS (Oct. 3, 2008), <http://www.freep.com/article/20081003/OPINION01/810030434/>; Barack Obama, Remarks by the President on Justice David Souter (May 1, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-The-President-On-Justice-David-Souter/](http://www.whitehouse.gov/the_press_office/Remarks-By-The-President-On-Justice-David-Souter/).

be even-handed, to understand all sides of a case, and to try to see the world (or a case) from the perspectives of other people (or people different than himself or herself).<sup>142</sup> President Obama's reference to living "in the real world" conveyed his judicial nominee's commitment to immersing herself in the facts of a particular dispute and the pertinent law.<sup>143</sup> The implicit suggestion was that, in contrast to Republican appointees such as Justices Scalia and Thomas,<sup>144</sup> an Obama nominee would not be rigidly committed to some abstract principle or indifferent to the nuances and significance of the facts of the cases before him or her. As a White House official described President Obama's nominee Sonia Sotomayor, "[h]er judicial philosophy was to follow the rule of law, [and] apply it in each case . . . . She was not going to be painted as an ivory-tower judge, but a real-world judge."<sup>145</sup>

Throughout the summer of 2009, the Senate's confirmation proceedings on Justice Sotomayor's nomination followed two tracks.<sup>146</sup> First, Democratic senators on the Judiciary Committee focused on Justice Sotomayor's judicial record as a district and circuit judge.<sup>147</sup> They emphasized the significance of her unique experience—as only the fourth Supreme Court nominee who had previously served as a district judge, as well as having had the most federal judicial experience of any nominee in nearly 100 years.<sup>148</sup> They further stressed that her record amply demonstrated her fundamental commitment to focusing on the facts of a given case and was evidence of her "empathy" as a judge and her immersion in the "real-world."<sup>149</sup> "Real-world," or variations of it, were positively referenced a total of thirty times by Democratic senators in her confirmation hearings and on the Senate floor.<sup>150</sup> They spoke

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142. 155 CONG. REC. S8942 (daily ed. Aug. 6, 2009) (statement of Sen. Patrick J. Leahy).

143. *Obama: Aim for Fundamental Change*, *supra* note 141; see 155 CONG. REC. S8942 (daily ed. Aug. 6, 2009) (statement of Sen. Patrick J. Leahy).

144. ABRAHAM, *supra* note 1, at 295, 351-52.

145. Jeffrey Toobin, *Bench Press: Are Obama's Judges Really Liberals?*, NEW YORKER, Sept. 21, 2009, at 42, 44 (internal quotation marks omitted).

146. *See id.*

147. *Sotomayor Hearing*, *supra* note 134, at 3 (statement of Sen. Patrick J. Leahy); *id.* at 56 (statement of Sen. Kirsten E. Gillibrand).

148. *Id.* (statement of Sen. Patrick J. Leahy); *id.* at 56 (statement of Sen. Kirsten E. Gillibrand). The other Supreme Court Justices who had served previously as district court judges were all nominated to the Court by Republican presidents—Samuel Blatchford (nominated by Chester Arthur), Edward Sanford (nominated by President Warren Harding), and Charles Whittaker (nominated by President Dwight Eisenhower). ABRAHAM, *supra* note 1, at 192-93, 270; *Samuel Blatchford, 1882-1893*, SUP. CT. HIST. SOC., <http://www.supremecourthistory.org/history-of-the-court/associate-justices/samuel-blatchford-1882-1893/> (last visited July 27, 2012).

149. *Sotomayor Hearing*, *supra* note 134, at 37-38 (statement of Sen. Sheldon Whitehouse); *id.* at 116 (statement of Sen. Russell D. Feingold).

150. *Id.* at 41 (statement of Sen. Richard J. Durbin); *id.* at 45 (statement of Sen. Amy J.

positively of Sotomayor's "empathy" a total of fifty-two times in her confirmation hearings and on the Senate floor.<sup>151</sup> These references were meant to convey that Justice Sotomayor was not a jurist with her head in the clouds or enamored with abstract principles, but rather had the skills, intellect, and temperament to do the gritty, unglamorous, tough work of meticulously applying the law to the facts in the cases before her.<sup>152</sup> Those references also helped to raise the salience of these brands to the people watching or covering the Senate proceedings.

Second, Republican senators who opposed the Sotomayor nomination mentioned the "real-world judging" brand only once.<sup>153</sup> Ignoring the brand arguably helped to lower or diminish its notoriety or salience. Instead, they referenced "umpiring" as an ideal of judging eleven times in the Senate committee hearings and on the Senate floor.<sup>154</sup> Even more so, they took issue with "empathy" as a suitable criterion for judging, referencing it 128 times in Sotomayor's confirmation hearings and on the Senate floor.<sup>155</sup> Republican senators

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Klobuchar); *id.* at 116 (statement of Sen. Russell D. Feingold); 155 CONG. REC. S8916 (daily ed. Aug. 6, 2009) (statement of Sen. Richard J. Durbin); *id.* at S8925 (statement of Sen. John F. Reed); *id.* at S8928 (statement of Sen. John D. Rockefeller); *id.* at S8929 (statement of Sen. Barbara A. Mikulski); *id.* at S8933 (statement of Sen. John F. Kerry); *id.* at S8944 (statement of Sen. Harry M. Reid); 155 CONG. REC. S8788-89, S8851 (statement of Sen. Patrick J. Leahy) (daily ed. Aug. 5, 2009); 155 CONG. REC. S8731-32 (daily ed. Aug. 4, 2009) (statement of Sen. Patrick J. Leahy); *id.* at S8743 (statement of Sen. Sheldon Whitehouse).

151. *Sotomayor Hearing*, *supra* note 134, at 37-38 (statement of Sen. Sheldon Whitehouse); *id.* at 42, 501 (statement of Sen. Richard J. Durbin); *id.* at 116 (statement of Sen. Russell D. Feingold); *id.* at 127, 130, 132 (statement of Sen. Charles E. Schumer); *id.* at 374 (statement of Sen. Arlen Specter); 155 CONG. REC. S8917 (daily ed. Aug. 6, 2009) (statement of Sen. Richard J. Durbin); *id.* at S8933 (statement of Sen. John F. Kerry); *id.* at S8942 (statement of Sen. Patrick J. Leahy); 155 CONG. REC. S8789, S8850-51 (daily ed. Aug. 5, 2009) (statement of Sen. Patrick J. Leahy); *id.* at S8793 (statement of Sen. Amy J. Klobuchar); *id.* at S8816 (statement of Sen. Charles E. Schumer); 155 CONG. REC. S8743-44 (daily ed. Aug. 4, 2009) (statement of Sen. Charles Whitehouse); *id.* at S8754 (statement of Sen. Scott D. Brown).

152. *See* 155 CONG. REC. S8942 (daily ed. Aug. 6, 2009) (statement of Sen. Patrick J. Leahy).

153. 155 CONG. REC. S8943 (daily ed. Aug. 6, 2009) (statement of Sen. Mitchell J. McConnell). A search for "real-world judging" in the Congressional Record as spoken by Republican senators yielded zero results.

154. *Sotomayor Hearing*, *supra* note 134, at 7 (statement of Sen. Jefferson B. Sessions); 155 CONG. REC. S8922 (daily ed. Aug. 6, 2009) (statement of Sen. Jefferson B. Sessions); *id.* at S8939 (statement of Sen. Michael O. Johanns); 155 CONG. REC. S8798 (daily ed. Aug. 5, 2009) (statement of Sen. Christopher S. Bond); *id.* at S8811 (statement of Sen. Charles P. Roberts); 155 CONG. REC. S8733, S8753 (daily ed. Aug. 4, 2009) (statement of Sen. Jefferson B. Sessions).

155. *Sotomayor Hearing*, *supra* note 134, at 6-8 (statement of Sen. Jefferson B. Sessions); *id.* at 12 (statement of Sen. Orrin G. Hatch); *id.* at 17-18 (statement of Charles E. Grassley); *id.* at 22, 121, 457, 552 (statement of Sen. Jon L. Kyl); *id.* at 39-40 (statement of Sen. Thomas A. Coburn); 155 CONG. REC. S8899 (daily ed. Aug. 6, 2009) (statement of Sen. Orrin G. Hatch); *id.* at S8919-20 (statement of Sen. George V. Voinovich); *id.* at S8923-24 (statement of Sen. Charles E. Grassley); *id.* at S8939 (statement of Sen. Michael O. Johanns); *id.* at S8941 (statement of Sen. Jefferson B. Sessions); *id.* at S8943 (statement of Sen. Addison M. McConnell); 155 CONG. REC. S8800 (daily

suggested that the nominee's speeches and three of her judicial decisions showed she was not committed to being a neutral umpire or to "interpreting the law not making the law."<sup>156</sup>

Interestingly, the debate over President Obama's second nominee to the Court, Elena Kagan, followed the same two tracks, though with some minor differences. Kagan spent a day less than Sotomayor as a witness because Senator Robert Byrd died shortly before the beginning of her hearings and a day was set aside for his funeral in the midst of her hearings.<sup>157</sup> Her hearings also occurred in the year of a mid-term election, in which the majority party usually could be expected to lose seats in Congress.<sup>158</sup> Indeed, the Democrats later lost control of the House and were within a couple seats of losing the Senate.<sup>159</sup> While Republicans on the Judiciary Committee and on the floor largely bashed "empathy" in judging during the Kagan proceedings,<sup>160</sup> Democratic senators referenced "real-world judging" forty-four times in committee hearings and floor debate in support of Kagan's nomination.<sup>161</sup>

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ed. Aug. 5, 2009) (statement of Sen. John Cornyn); *id.* at S8810-11 (statement of Sen. Charles P. Roberts); *id.* at S8814 (statement of Sen. Roger F. Wicker); *id.* at S8822 (statement of Sen. Jon L. Kyl); *id.* at S8823, S8825 (statement of Sen. Thomas A. Coburn); *id.* at S8829-30 (statement of Sen. Samuel D. Brownback); 155 CONG. REC. S8710 (daily ed. Aug. 4, 2009) (statement of Sen. Addison M. McConnell); *id.* at S8733, S8753 (statement of Sen. Jefferson B. Sessions); *id.* at S8745-46, S8749 (statement of Sen. Orrin G. Hatch); *id.* at S8752 (statement of Sen. James M. Inhofe); *id.* at S8780, S8783 (statement of Sen. Charles E. Grassley).

156. *See* *Maloney v. Cuomo*, 554 F.3d 56, 58 (2d Cir. 2009) (per curiam) (holding that the Fourteenth Amendment does not incorporate the Second Amendment), *vacated sub nom.* *Maloney v. Rice*, 130 S. Ct. 3541, 3541 (2010); *Ricci v. DeStefano*, 530 F.3d 87, 87 (2d Cir. 2008) (per curiam) (dismissing the claim that the city's failure to use the results of a promotion test violated Title VII), *rev'd* 129 S. Ct. 2658, 2664, 2681 (2009); *Ciszewski v. New York*, 279 F. App'x 39, 40 (2d Cir. 2008) (rejecting takings clause challenge to governmental exercise of eminent domain); *Sotomayor Hearing*, *supra* note 134, at 7 (statement of Sen. Jefferson B. Sessions); *id.* at 18 (statement of Sen. Charles E. Grassley).

157. Ann Gerhart, *A Winning Performance That Charmed Her Critics*, WASH. POST, July 1, 2010, at A4; Christine Delargy, *Kagan Hearings to Be Suspended While Byrd Lies in State*, CBS NEWS (June 30, 2010, 12:08 PM), [http://www.cbsnews.com/2102-503544\\_162-20009290.html](http://www.cbsnews.com/2102-503544_162-20009290.html); *Sotomayor Still Standing After Testimony*, CBS NEWS (July 22, 2009, 6:09 PM), <http://www.cbsnews.com/stories/2009/07/16/politics/main5163715.shtml>.

158. Carl Hulse & Jeff Zeleny, *Court Nominee Figures in Midterm Campaigns*, N.Y. TIMES, May 12, 2010, at A16; *Election 2010: House Map*, N.Y. TIMES, <http://elections.nytimes.com/2010/results/house> (last visited July 27, 2012); *Election 2010: Senate Map*, N.Y. TIMES, <http://elections.nytimes.com/2010/results/senate> (last visited July 27, 2012).

159. *Election 2010: House Map*, *supra* note 158; *Election 2010: Senate Map*, *supra* note 161.

160. *See, e.g., Confirmation Hearing on the Nomination of Elena Kagan to Be an Associate Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 15 (2010) [hereinafter *Kagan Hearing*] (statement of Sen. Charles E. Grassley); 156 CONG. REC. S6603 (daily ed. Aug. 3, 2010) (statement of Sen. Jefferson B. Sessions); *id.* at S6669 (statement of Sen. Charles E. Grassley).

161. *Kagan Hearing*, *supra* note 160, at 4 (statement of Sen. Patrick J. Leahy); *id.* at 26, 152 (statement of Sen. Charles E. Schumer); *id.* at 42-44 (statement of Sen. Amy J. Klobuchar); *id.* at 52

It is, however, too soon to determine with any certainty the precise impact of “empathy” or “real-world judging” as brands of judging. It is possible that the attack on empathy might have buried the term at least in the foreseeable future, though it is likely that the notion that a judge strives to see the world from the perspective of others retains broad social appeal. With respect to “real-world judging,” it is important to recognize that the Sotomayor and Kagan nominations were not the first opportunities for senators to emphasize the importance of “real-world judging” or “realism” in judging. Democratic senators referenced “real-world judging” eleven times in the Roberts proceedings,<sup>162</sup> and Republicans referenced it three times during Senate proceedings on Justice Alito’s nomination.<sup>163</sup> In using the term “real-world judging,” President Obama and Democratic senators were not only co-opting a brand that had been used once before (assuming it was previously being used as a brand), but also trying to refine its narrative. For Democratic senators, the brand signified the nominee’s positive attributes.<sup>164</sup>

Second, “real-world judging” as a brand hardly appeared in newspaper reports on the Sotomayor and Kagan confirmation hearings (indeed, it made it into only seven stories in major newspapers during the Sotomayor proceedings and eight stories during the Kagan proceedings),<sup>165</sup> while “empathy” received much more attention in the media.<sup>166</sup> The Republican attacks on “empathy” might have helped to overshadow, at least for the newspaper media, the positive case being made for “real-world judging.”

Third, the lack of any real likelihood that Justices Sotomayor and Kagan would not be confirmed by the Senate deprived their respective

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(statement of Sen. John F. Kerry); *id.* at 183 (statement of Sen. Benjamin L. Cardin); 156 CONG. REC. S6629 (daily ed. Aug. 3, 2010) (statement of Sen. Jeanne Shaheen); 156 CONG. REC. S6699 (daily ed. Aug. 4, 2010) (statement of Sen. Barbara L. Boxer); *id.* at S6709-13 (statement of Sen. Patrick J. Leahy); 156 CONG. REC. S6761-62 (daily ed. Aug. 5, 2010) (statement of Sen. Charles E. Schumer); *id.* at S6817 (statement of Sen. Mark P. Begich); *id.* at S6821 (statement of Sen. Maria E. Cantwell); *id.* at S6824-25 (statement of Sen. Patrick J. Leahy).

162. *Roberts Hearing*, *supra* note 118, at 168, 318 (statement of Sen. Edward M. Kennedy); 151 CONG. REC. 20,905, 21,274, 21,630 (2005) (statement of Sen. Edward M. Kennedy); *id.* at 20,908 (statement of Sen. John F. Kerry); *id.* at 21,274 (statement of Sen. Joseph I. Lieberman).

163. *Alito Hearing*, *supra* note 119, at 478 (statement of Sen. Arlen Specter); 152 CONG. REC. 165 (2006) (statement of Sen. George V. Voinovich); *id.* at 197 (statement of Sen. Richard M. DeWine).

164. *Sotomayor Hearing*, *supra* note 134, at 41 (statement of Sen. Richard J. Durbin); 156 CONG. REC. S6699 (daily ed. Aug. 4, 2010) (statement of Sen. Barbara L. Boxer).

165. These results came from two LexisNexis searches. First, a search for “real world” or “real-world judging” AND Sotomayor between 7/13/2009 and 8/6/2009; second, a search for “real world” or “real-world judging” and AND Kagan AND Elena between 6/28/2010 and 8/5/2010.

166. See, e.g., Donald B. Ayer, *Beyond ‘Balls and Strikes’: Elena Kagan and the Supreme Court’s Real Work*, WASH. POST, June 21, 2010, at A17; Gerhart, *supra* note 157, at A4.

proceedings of much drama. Without the drama, the public might not have been as much engaged with the hearings as they otherwise might have been (viewership reportedly dropped off after Kagan's opening statement and the first day of testimony),<sup>167</sup> and the brand might not have received as much public attention as it could have received under other circumstances. It is likely that the brand will require more publicity and promotion in the future to make it possible for it to have meaningful traction in public discourse on judging.

Last but not least, the constitutional or historical significance of a particular confirmation proceeding depends a great deal on how it comes out (as well as on how subsequent senators regard it). To be sure, Republican Senator John Cornyn of Texas tried to define the significance of the Sotomayor hearings when he declared that:

[W]e all . . . agreed that judges should interpret the law—and not make the law. We agreed that judges should rely upon original intent of the Framers when interpreting the Constitution—and not on foreign or international law. We agreed that judges should apply the law faithfully—and not move the law in the direction of their own policy preferences. We agreed that judges should be impartial—and not pick winners or losers based on . . . what is in the judge's heart.<sup>168</sup>

Yet, this assertion could not erase the significance of other events, including the confirmations of Justices Sotomayor and Kagan each by comfortable margins: 68-31 for Sotomayor<sup>169</sup> and 63-37 for Kagan.<sup>170</sup> The confirmations of two Supreme Court justices with the particular attributes that Senator Cornyn and other Republicans had unsuccessfully opposed are obvious affirmations, rather than rejections of, those attributes. Thus, their confirmations effectively ratified “real-world judging” as a brand.

## V. CONCLUSION

Public confidence in judging likely depends on many factors. Among these is political rhetoric or how national political leaders, party and interest group leaders, and the media elite talk about the courts,

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167. See Michael Wilson, *Serenity of Harvard Club Unruffled by Court Hearing*, N.Y. TIMES, June 29, 2010, at A28.

168. Press Release, Senator John Cornyn, Sen. Cornyn Statement in Advance of the Judiciary Committee's Vote on Judge Sotomayor (July 28, 2009), [http://www.cornyn.senate.gov/public/index.cfm?p=InNews&ContentRecord\\_id=c2009a6f-802a-23ad-4f11-43302977cf6e&ContentType\\_id=b94acc28-404a-4fc6-b143-a9e15bf92da4&f6c645c7-9e4a-4947-8464-a94cacb4ca65&Group\\_id=bf378025-1557-49c1-8f08-c5df1c4313a4&MonthDisplay=7&YearDisplay=2009](http://www.cornyn.senate.gov/public/index.cfm?p=InNews&ContentRecord_id=c2009a6f-802a-23ad-4f11-43302977cf6e&ContentType_id=b94acc28-404a-4fc6-b143-a9e15bf92da4&f6c645c7-9e4a-4947-8464-a94cacb4ca65&Group_id=bf378025-1557-49c1-8f08-c5df1c4313a4&MonthDisplay=7&YearDisplay=2009).

169. *Supreme Court Nominations, Present–1789*, *supra* note 2.

170. *Id.*



particular judges, judicial nominees, and judging. Such talk is plainly protected by the First Amendment and made possible by virtue of the fact that the Constitution vests political leaders with the authority to address and analyze judging. Such talk also employs branding—the practice of packaging, characterizing, describing, promoting, or deriding particular judges and justices, judicial decisions, judicial nominees, and judging. Branding may be used for political purposes, and it is evident that political leaders must think such branding matters since they have employed it with respect to judges or judging throughout American history. Familiar brands include, but are hardly limited to, “strict construction,” “activism,” “judicial restraint,” “the Living Constitution,” “originalists,” “umpires,” “legislating from the bench,” and “real-world judging.”

Branding has distinct analytical advantages over the social science methods of framing and labeling. Framing and labeling are well-established methods for measuring the connections between rhetoric on the one hand and the perceived status of a person, practice, or phenomenon, such as judging, on the other. But, branding is not limited to motivating or channeling large-scale social movements, like framing, or solely to negative purposes, like labeling. Branding can be employed to function like framing and labeling, but it can do more. It also has a lexicon that neatly fits the reality of contests over, or discussions of, judges and judging.

We do not know, however, about the actual impact of branding on public confidence in judging. It could have negative effects. By oversimplifying and even distorting how judges actually do their jobs, branding might undermine public understanding of judging or the distinction between law and politics. Moreover, it might sharpen or exacerbate the differences of opinion that the public might already have about particular judicial decisions, judges, or styles of judging. Branding also might have some positive effects, because it might facilitate the promotion of a particular judge, decision, or style of judging. It can also attract the public’s attention, and thus draw more attention to proceedings that it might be good (or interesting) for the public to watch. Yet, it is conceivable that branding sometimes might have little or no effects at all; the general public might not care or pay attention to judicial confirmation hearings or to politicians’ branding of judging, competing brands might cancel each other out, or branding might primarily appeal to people whose views are already fixed.

There is no doubt that we could benefit from more empirical research on constitutional branding. More research is needed to illuminate the grounds on which the public forms opinions about, or

gains confidence in, judging. Moreover, such research needs to be sensitive to word effects, the differences in the results of polls of the public depending on the terms or concepts about which the public is being asked. People are likely to express different opinions depending on whether they are being formed about things that sound more like specific rulings or judges than the institution.

My hope is that law professors, as well as social scientists, might consider branding to be a politically motivated act that they can track in public rhetoric and polling about judging. The results will help us to improve our understanding of how politics might be used to shape certain legal constructs and public attitudes about law, politics, and judging. If, for instance, public opinion shapes outcomes in Supreme Court decision-making, then knowing how the former came into being (and what shaped it) will illuminate a good deal about the relationship between public opinion and the Court's decisions. But, if the Court shapes public opinion (about the law and about judging), then knowing how the Court is able to do this, particularly when people are not reading its opinions, will broaden our understanding of the relationship between law and politics. Branding might turn out to be instrumental to the dynamic interaction between public opinion and the Court, but even if it does not, this would be a useful thing to know. Hence, branding is a good place for legal scholars and social scientists to find common ground in their mutual endeavor to analyze how politics might influence the law and public attitudes about judging.